PP

v.

TAN ANN CHYE

HIGH COURT MALAYA, SHAH ALAM
SURIYADI HALIM OMAR J
[CRIMINAL TRIAL NO: 47-4-2000]
7 NOVEMBER 2002

CRIMINAL LAW: *Dangerous Drugs Act 1952 - Section 39B(1)(a) - Trafficking in 29.8 grams of mixed heroin and monoacetylmorphines - Drugs rolling over from basket of motorcycle - Whether proving custody or control - Whether raising any presumption - Analysis - Minuscule sample - Chemist only analyzing 0.1% of drugs - Whether fatal - Whether no prima facie case made out - Dangerous Drugs Act 1952, ss. 37(d), (j), 39B(1)(a)*

CRIMINAL PROCEDURE: *Charge - Ingredients - Trafficking in dangerous drugs - Charge adverting to 'mixed heroin and monoacetylmorphines' - Phrase 'mixed heroin' - Whether not connoting a known dangerous drug - Whether confusing - Whether charge defective*

The accused was charged with an offence under s. 39B(1)(a) Dangerous Drugs Act 1952 ('the Act') for trafficking in "29.8 grams of mixed heroin and monoacetylmorphines (5.2 grams heroin and 24.6 grams monoacetylmorphines)". Before the learned judge, questions *inter alia* arose as to whether the prosecution had proved custody and control, and had successfully invoked the presumption of knowledge under s. 37(d) of the Act, when the evidence merely showed that the dangerous drugs was discovered by way of the police ramming their car into the accused's motorcycle thereby causing the package containing the drugs to roll off from the basket of the motorcycle. The facts also showed that the chemist, after homogenizing the suspected substance for five minutes, had taken only 420 milligrams of same for qualitative analysis, which was equivalent to 0.1 % of the whole amount. In the ciscumstances, a question also arose as to whether the said 0.1% sample could be considered as representative of the whole bulk of the homogenized substance, particularly so when the prosecution had intimated to the court that they were rejecting any reliance on s. 37(j) of the Act. Further, following the use of the words 'mixed heroin' in the charge, a question had also arisen as to whether the charge herein was bad in law.

Held:

[1] There is no scheduled drug called 'mixed heroin' in Part I, Part II or Part III of the First Schedule to s. 2 of the Act. The nearest to it was 'heroin'. The charge here is therefore flawed and the flaw cannot be regarded as mere irregularity. (p 882 a-c)

[1a] Even if the impugned words were meant to indicate the combination of two types of drugs being trafficked by the accused, yet the structure of the sentence says otherwise. The charge, by stating that the accused had trafficked "29.8 grams of mixed heroin and monoacetylmorphines", had charged the accused with trafficking two items, namely mixed heroin and monoacetylmorphines. The latter word is equally confusing as monoacetylmorphines is a distinct dangerous drug found in the Schedule, and not a drug made up of the substance heroin and monoacetylmorphines. All this interpretation must surely be very confusing to the accused person. (p 882 d-e)

[2] When a presumption provision is not invoked, the prosecutor is without choice but to prove that actual trafficking within the context of its definition did actually occur, ie. by way of direct evidence. This means that the impugned dangerous drugs here will have to be conclusively proved as heroin and monoaceylmorphines (and with their respective weights as per the charge) without the intervention of the proof of any other fact. (p 885 a-e)

[3] It cannot be said that the chemist did not rely on the concept of presumption when proving the whole impugned drug. This must be so as, after homogenizing the suspected substance, the chemist had only relied on 0.1% sample to prove that the balance 99.9% contained in all the receptacles were of the same nature and description as the sample analysed. Clearly, no direct evidence was adduced to prove that the receptacles were dangerous drugs as elaborated in the charge. (pp 885 g-h & 886 a)

[4] Section 37(j) of the Act gives rise to two constructions, namely: (i) the analysis is to be carried out on 10% of the gross contents of all the receptacles; and (ii) an unspecified percentage or amount of sample will be used for analysis only on 10% of the combined receptacles seized. (p 888 a-c)

[4a] However, to obviate injustice and to put into effect the law on drugs as intended by parliament, a construction most beneficial to the accused person cannot be sidelined. On that premise, by all accounts, to permit the invocation of s. 37(j), the chemist must carry out a sampling analysis of no less than 10 % of the contents of all the receptacles. In this case, even though the chemist had homogenized the contents of all the receptacles, he had only analysed a fraction of the contents of all the receptacles and not 10%. This error was fatal to the prosecution's case. (p 891 b-d)

[5] The prosecution had clearly failed to prove the relevant particulars, namely the dangerous drugs together with their weights, as per the charge. This apart, there was no conclusive evidence to show that the accused knew of the existence of the package, let alone the contents. The evidence against the accused was essentially of juxtaposition, amounting to nothing more than grave suspicion. Such evidence is totally inadequate to prove control or custody of the receptacles or attract the presumption under s. 37(d). (pp 896 d-e & 897 a-b)

[Accused acquitted and discharged without calling for defence.]

Case(s) referred to:

Abdullah Zawawi Yusof v. PP [1993] 4 CLJ 1 SC ***(refd)***
Alcontara Ambross Anthony v. PP [1996] 1 CLJ 705 FC ***(refd)***
Au Ah Lin v. PP [1963] MLJ 365 ***(dist)***
Chin Choy & Ors v. Collector of Stamp Duties [1979] 1 MLJ 69 ***(refd)***
Creswell v. BOC Ltd [1980] 3 All ER 443 ***(refd)***
Khoo Hi Chiang v. PP [1994] 2 CLJ 151 SC ***(refd)***
Leong Bon Huat v. PP [1993] 3 CLJ 603 SC ***(refd)***
Loo Kia Meng v. PP [2000] 3 CLJ 653 CA ***(refd)***
Maunsell v. Olins [1975] AC 373 ***(refd)***
Muhammed Hassan v. PP [1998] 2 CLJ 170 FC ***(refd)***
Munusamy v. PP [1987] 1 MLJ 492 ***(refd)***
PP v. Ang Soon Huat [1991] 1 MLJ 1 ***(refd)***
PP v. Cheng Meng Bong [1965] 1 MLJ 237 ***(dist)***
PP v. Chew Siew Luan [1982] CLJ 354; [1982] CLJ (Rep) 285 FC ***(refd)***
PP v. Lam San [1991] 3 MLJ 426 ***(refd)***
PP v. Lin Lian Chen [1992] 1 CLJ 2086; [1992] 1 CLJ (Rep) 285 SC ***(refd)***
PP v. Mohd Noor Jantan [1979] 2 MLJ 289 ***(refd)***
PP v. Norzilan Yaacob & Anor [1989] 1 CLJ 466; [1989] 2 CLJ (Rep) 345 HC ***(refd)***
See Yew Poo v. PP [1949] MLJ 131 ***(refd)***
Teoh Hoe Chye v. PP; Yeap Teong Tean v. PP [1987] 1 CLJ 471; [1987] CLJ (Rep) 386 SC ***(refd)***
The Torenia [1983] 2 Lloyd's Rep 210 ***(refd)***

Legislation referred to:
Criminal Procedure Code, s. 163
Customs Ordinance 1952, s. 116
Dangerous Drugs Act 1952, ss. 12(2), 37(da), (iiia), 37(j), 39A(1)(d), (2)(d), 39B(1)(a), (2)
Excise Act 1961, s. 61
Interpretation Acts 1948 and 1967, s. 4(3)

For the prosecution - Kamarulzaman Ab Jalil DPP
For the accused - Gooi Soo Seng; M/s Gooi & Azura

Reported by WA Sharif

JUDGMENT

Suriyadi Halim Omar J:

The prosecution's case was that PW6, one inspector Rajendran a/1 Kanasan, who was attached to the operation and investigation section of the Narcotics Division in Sentul, Kuala Lumpur had received information of drugs trafficking. He was informed that a male Chinese, riding a motorcycle would be involved in that transaction. That was on 18 May 1999. During the cross-examination he related that he was not informed of the identity of the culprit let alone the registration number of the vehicle involved. On receipt of that information, he immediately roped in and briefed no less than eleven police personnel, as to the course of action to undertake. Having completed that briefing they drove off toward the direction of the supposed place of possible transaction, with PW6 being driven in an unmarked car whilst the rest riding on separate motorcycles.

At about 6pm on reaching Jalan SU 25 Taman Selayang Utama, Selangor the police party immediately reconnoitered the area, and thereafter set up position. PW6's instructions to the other accompanying members were that they were to communicate to him by cellular telephones on seeing any male Chinese acting suspiciously. At that material time the whole stretch of Jalan SU 25 was quiet, with shops and factories in the vicinity closed. At about 6.30pm a motorcycle ridden by a male Chinese, was seen entering Jalan SU 25, riding slowly towards the direction of the main road. The prosecution witness deduced that he was acting suspiciously, as he was looking left and right while riding, as if looking for someone.

PW6 still in the car then directed his driver to tail that vehicle at a distance of about 20-30 feet. Somewhere at the junction of Jalan SU25 the suspect suddenly made a U-turn, whereupon in order to stop him, PW6 ordered his driver to ram him lightly. The impact caused the motorcycle and the suspect to fall, with the latter momentarily pinned under the weight of his machine.

With some alacrity the police rushed out of the car, and simultaneously shouting "police!" In that split second and in quick succession, PW6 saw the suspect trying to free his leg from the motorcycle, and witnessed a white plastic package rolling off the vehicle's basket, eventually to rest on the road's surface. The suspect after freeing himself had darted off, and after a five meter chase, followed by a struggle had been apprehended. That suspect was identified as the accused person. From that white plastic package the police had seized items, which were confirmed by the Chemist Department as dangerous drugs. As the accused person had no authorisation of the Minister to possess them, he was thereupon charged by the Public Prosecutor, for the offence of trafficking under s. 39B(1)(a) of the Dangerous Drugs Act 1952 (hereinafter referred to as the Act).

For easy reference I herewith reproduce the charge:

> Bahawa kamu pada 18 Mei 1999, jam lebih kurang 6.00 petang di SU 25, Taman Selayang Utama, di dalam daerah Gombak, di dalam Negeri Selangor Darul Ehsan, telah memperedarkan dadah berbahaya, iaitu 29.8 gram campuran heroin dan monoacetylmorphines (5.2 gram heroin dan 24.6 gram mono acetylmorphines); dan oleh yang demikian, kamu telah melakukan suatu kesalahan di bawah seksyen 39B(1)(a) Akta Dadah Berbahaya, 1952 dan boleh dihukum di bawah seksyen 39B(2) Akta yang sama.

The translated version would read thus:

> That you on May 18, 1999 at about 6 p.m. at SU 25, Taman Selayang Utama, in the district of Gombak, in the State of Selangor Darul Ehsan had trafficked dangerous drugs *viz*. 29.8 grams of mixed heroin and monoacetylmorphines (5.2 grammes heroin and 24.6 grammes of monoacetylmorphines); and as such you had committed an offence under section 39B(1)(a) of the Dangerous Drugs Act 1952, and punishable under section 39B(2) of the same Act.

Under Part IV, with s. 12 as an example, no person shall except with the authorisation of the Minister import or export into or from Malaysia respectively, possess, have custody or control any dangerous drug, unless authorised under this Act or the regulations made thereunder. Under PART VI of the Act, Parliament went a step further by tightening the screws when it promulgated laws, which made trafficking of dangerous drugs a serious offence as reflected by the sentence. Any person found contravening s. 39B(1) if found guilty, shall be punished with the draconian sentence of death on conviction. To clarify, under s. 39B(1) the trafficking must be of dangerous drugs, which under s. 2 (PART 1), means any drug or substance, which for the time being is comprised in the First Schedule.

After a perusal of the FIRST SCHEDULE whether PART 1, PART 11 or even Part 111, I was unable to find a scheduled drug called 'mixed heroin' as per the charge submitted by the Public Prosecutor. The nearest to it was a mere 'heroin'. Without being facetious, it must be emphasised that death may be the end product of this case if found guilty. That being so, the thread of a person's life should not be taken lightly and gambled away on uncertainties let alone inept draftsmanship. The flaw here cannot be regarded as a mere procedural irregularity, as the charge, which is the very core of this whole exercise cannot just be swept away under the proverbial carpet by inane remarks in the like of "the court knows what it means." The charge must be framed in such a way that the accused person will positively, and with precision know what he is being charged for, so as to enable him to answer it as best as he could. If the certainty is lacking, any substantive flaw that could mislead any accused person must tilt in his favour.

To take the matter a step further, a scrutiny of the provisions in the like of ss. 37 (meant for presumptions) and 39A, are ominously silent as to the terminology of 'mixed heroin' too. Even if the impugned words were meant to indicate the combination of two types of drugs being trafficked by the accused, yet the structure of the sentence says otherwise. The charge in clear terms stated that the accused had trafficked 29.8 grams of mixed heroin (not a mixture of or a combination of two different and distinct drugs) and monoacetylmorphines (5.2 grammes heroin and 24.6 grammes of monoacetylmorphines). In other words he was accused of trafficking two items *viz.* mixed heroin, and monoacetylmorphines, which were a composition of 5.2 grammes of heroin and 24.6 grammes monoacetylmorphines. The latter italicised phrase is equally as confusing as monoacetylmorphines is a distinct dangerous drug found in the Schedule, and not a drug that is made up of the substance of heroin and monoacetylmorphines. All this interpretation surely must be very confusing to the accused person. At best it now means that the accused person was trafficking 29.8 grams of mixed heroin, 5.2 grammes of heroin and 24.6 grammes of monoacetylmorphines. It could also mean that he was trafficking 29.8 grammes of mixed heroin and monoacetylmorphines (composed of heroin and a drug with the same spelling). Which is which now?

However industrious or ingenious the Deputy Public Prosecutor may be, when justifying the usage of the two confusing words together with the format of the charge, surely the rights of the accused person cannot be made subservient to fancy words, especially when there were already more than two possible interpretations made available for my consideration.

To be fair to the Deputy Public Prosecutor, even if he had meant to convey the message that the accused was charged for trafficking two distinct drugs *viz.* heroin and monoacetylmorphines, the drafting was surely very much to be desired. Regardless of that, I must at the outset categorically opine that there is nothing under the Act, which may prevent the Public Prosecutor from charging a person for trafficking in more than one dangerous drug in one charge. That remark of course must be subject to the scenario of a distinct offence having been committed by the accused eg, at different times or place, whereupon a separate charge must be preferred (*Public Prosecutor v. Norzilan bin Yaacob & Anor* [1989] 1 CLJ 466; [1989] 2 CLJ (Rep) 345, *See Yew Poo v. Public Prosecutor* [1949] MLJ 131; see also s. 163 of the Criminal Procedure Code for comparison).

Apart from there being no promulgated provisions preventing the Public Prosecutor from charging a person in the current manner, provisions in the like of ss. 37(da) (iiia), 39A(1)(d) and 39A(2)(d) certainly make it obviously permissible. Under s. 37(da) (iiia) of the Act, the statute recognises the situation that any person found in possession of a total of 15 grammes or more in weight of heroin, morphine and monoacetylmorphines or a total of 15 grammes or more in weight of any two of the said dangerous drugs, otherwise than in accordance with the authority of the Act or any other written law, shall be presumed, until the contrary is proved, to be trafficking in the said drug. Surely if Parliament had seen it fit to promulgate a deeming provision which provides for a situation where the deeming provision could be activated, when the combined distinct dangerous drugs have reached a total sum of more than 15 grammes, it must also inevitably mean that the charging of a person for trafficking of more than one distinct dangerous drug in one charge had been anticipated.

To strengthen the above view, under ss. 39A(1)(d) and 39A(2)(d), provisions which deal with offenders more seriously than eg, s. 12(2), a person may also be charged for any contravention of the Act, with the charge carrying more than one dangerous drug in it. Thus by analogy, similar to those two substantive provisions, read together with the above view pertaining to s. 37(da) (iiia), I fail to find any justification in rejecting the charge merely on account of the insertion of more than one distinct dangerous drug in it.

Even though s. 39B(1)(a) is framed in the singular as the provision reads, "traffic in a dangerous drug", the plural is built into it in the circumstances of the case. Section 4(3) of the Interpretation Acts 1948 and 1967 (Act 388) in crystal clear terms provides that words and expressions in the singular include the plural, and words and expressions in the plural include the singular. It goes without saying that the Public Prosecutor's task would be made easier if separate charges were preferred for every distinct dangerous drug. Needless to

say also that if legal officers still desire to risk living dangerously by persisting in pursuing the current format, but with variations in the like of the pertinent portion of the charge lumping the drugs together or mentioned separately, s. 37(da) (iiia) would still be available to assist them.

To wind up this legal poser, with there being no inhibition in the general law or of this special Act lumping the dangerous drugs in one charge, let alone it being one distinct offence as it was committed in one supposed transaction, I was satisfied that no error had occurred in this context (*Public Prosecutor v. Chew Siew Luan* [1982] CLJ 354; [1982] CLJ (Rep) 285; *Law of Dangerous Drugs (Cases and Commentaries)* by Daljit Sen Adel). It is thus up to officers of the Public Prosecutor's office to deal with the matter as deftly as possible, if they still insist in repeating the same bold format as in the current case, minus the blunders.

It was quite obvious, on the assumption I accepted the evidence of the chemist, that the heroin portion weighed only 5.2 grammes, and a charge had been preferred against the accused person for trafficking only of heroin, the learned Deputy Public Prosecutor would have been deprived of the assistance of s. 37(da), (iiia). He would also have been deprived of s. 37(da), (i) as this provision requires a person to be in possession of 15 grammes or more in weight of heroin. To overcome this setback, the prosecution had ingeniously "borrowed" the more substantial monoacetylmorphines, and had them dragged into the charge. With that marriage a minimum statutory inflated figure of dangerous drugs had been obtained, thus sufficiently bloated to overcome the shortfall. Now he would certainly be eligible to invoke the abovementioned s. 37(da), (iiia). Unfortunately with the application of the above view as regards the "mixed heroin" factor prevailing, thus eliminating 29.8 grammes from the charge, and at the same time making the charge defective at the outset, the invocation of the presumption provision would be a non-starter.

I was not unmindful of the fact that the learned Deputy Public Prosecutor at the outset of his submission had declared his desire not to rely on the presumption provision of s. 37(j) of the Act, in his sojourn to prove the case. His words in *verbatim* were:

> Dalam kes ini saya berhujah anggapan di bawah seksyen 37(j) Akta Dadah Berbahaya 1952 tidak terpakai atau tidak di gunakan oleh ahli kimia (SP5) dalam analisisnya.

(Translation: "In this case, I submit that the presumption under section 37(j) Dangerous Drugs Act 1952 is inapplicable or not adverted to by the chemist (SP5) in his analysis.")

As the learned Deputy Public Prosecutor had ventilated his stance, he was thus left only with direct evidence to establish that all the drugs seized as per the charge were what they were (subject to my argument of the 'mixed heroin' factor). As that decision was within his prerogative, and as I do not wish to speculate or delve into his reasoning any further, the matter of his course of action ends here.

I now would like to skim briefly s. 37(j), as it certainly would be useful later as a point of reference, prior to deciding whether the chemist's evidence could be accepted or not especially when he did not analyse all the impugned drugs. Under this presumption provision, in a gist an analysis of a certain amount of the seized suspected dangerous drugs would have to be undertaken first, before the contents of all the seized receptacles were to be presumed to be dangerous drugs. Logically, if direct evidence were to be adverted to, the reasonable expectation would be that the chemist had analysed every grain of suspected substance mixed with dangerous drugs found in all the receptacles. Not too dissimilar to the exercise of proving the ingredient of trafficking, when a presumption provision is not invoked, the prosecutor is without choice but to prove that actual trafficking within the context of its definition did actually occur.

Direct evidence is evidence, which if believed, proves the existence of fact in issue without inference or presumption. This means the impugned dangerous drugs here will have to be conclusively proved as heroin and monoactylmorphines (and with their respective weights as per the charge), without the intervention of the proof of any other fact. *Black's Law Dictionary* (6th edn) *inter alia* authored:

> Direct evidence means evidence which in the first instance applies directly to the *factum probandum*, or which immediately points to a question at issue, or is evidence of the precise fact in issue ...
>
> ... Evidence that directly proves a fact, without an inference or presumption, and which in itself, if true, conclusively establishes that fact.

Here, the chemist after homogenising the suspected substance for five minutes had merely taken 420 milligrams in six weighing for qualitative analysis, which was 0.1% of the whole amount. He later concluded that he was satisfied that the sum total of the dangerous drugs was as per the charge. For the quantitative analysis, as far as he was concerned regardless of the amount of sample used, be it 0.1%, 10% or 100% the key factor to the analysis was its homogeneity. He testified that 0.1% of the suspected substance taken for analysis was representative of the whole bulk of the homogenised substance, obtained after homogenising it for a period of five minutes. The same argument applied equally to his qualitative analysis.

Regardless of the brave words of the learned Deputy Public Prosecutor, of rejecting s. 37(j), did the chemist not rely on the concept of presumption when proving the whole impugned drugs? Did he not, after homogenising the seized suspected substance, rely on that 0.1% sample to prove that the balance 99.9% contained in all the receptacles were of the same nature and description as the sample so analysed? Is that not adverting to the concept of presumption to establish the impugned drugs? Where then was the direct evidence?

Section 37(j) of the Act reads:

> When any substance suspected of being a dangerous drug has been seized and such substance is contained in a number of receptacles, it shall be sufficient to analyse samples of the contents of a number not less than ten per centum of such receptacles and if such analysis established that such samples are all of the same nature and description, it shall be presumed, until the contrary is proved, that the contents of all the receptacles were of the same nature and description as the samples so analysed and if such analysis establishes that such samples consist of or contain a dangerous drug, it shall be presumed, until the contrary is proved, that the contents of all the receptacles consist of or contain the same proportion of such drug.

The relevant streamlined portion of this provision for our legal prognosis would appear thus:

> When any substance suspected of being a dangerous drug ... has been seized and ... is contained in a number of receptacles, it shall be sufficient to analyse samples of the contents of a number not less than ten per centum of such receptacles ... .

In the event of a desire on the part of any prosecutor to allude to the above provision for assistance, the salient ingredients legislated in it must be satisfied first. A brief scrutiny of this portion of the above provision will entail the satisfaction of the following preconditions, *viz*.:

i) any substance suspected of being a dangerous drug;

ii) has been seized;

iii) and contained in receptacles;

iv) it shall be sufficient to analyse samples;

v) of the contents; and

vi) of a number not less than 10% (content?) of such receptacles.

A reading of the above provision is an unenviable task, as with every reading a new and additional set of interpretation could be elicited, each dependant on a certain peculiar factor or factors, eg, the emphasis of a terminology, the time of pausing, and or the idiosyncrasies of the reader at the time of perusal. It is not a question of the eyes or tired mind playing tricks, but the outcome of draftsmanship that has imported many possible interpretations or constructions. Due to its imprecision it may produce, *inter alia*, these constructions, namely that:

i) the analysis is to be carried out on 10% of the gross contents of all the receptacles; and

ii) an unspecified percentage or amount of sample will be used for analysis only on 10% of the combined receptacles seized (a rather popular view with the Chemist Department).

The first canon of construction would be to give the ordinary, plain and natural meaning of the words in the statute (literal rule), and the second to construe the phrases and sentences according to the rule of grammar. If the effect is to produce which is contrary to the purpose of the statute then there will be a departure from the literal rule (*Creswell v. BOC Ltd* [1980] 3 All ER 443 *Chin Choy & Ors v. Collector of Stamp Duties* [1979] 1 MLJ 69; *Cross, Statutory Interpretation* (1987). In *Law of Dangerous Drugs* by Daljit Sen Adel the author had occasion to repeat *Maunsell v. Olins* [1975] AC 373 when he authored:

> Words would then be read in any secondary meaning which they are capable of bearing, "so as to obviate the injustice, absurdity, anomaly or contradiction or fulfill the purpose of the statue" with the help, if need be, of the aids of construction and presumptions in the law of statutory interpretation.

I now return and peruse the relevant streamlined sub-provision and relate it to the above two possible interpretations. After an intense scrutiny, I found that the two diverse constructions would depend very much on where the reader paused, before continuing his appreciation of the phrase "... it shall be sufficient to analyse samples of the contents of a number not less than ten per centum of such receptacles ..." If he paused for air after the word 'contents' (as if there were a comma), the first construction applies. If he paused after 'number', then the second one applies. Another judge, with equal force might possibly arrive at a different interpretation or view. How bizarre and confusing it must be, for an accused person, when faced with such a mind-boggling interpretive scenario.

If my first construction were to be applicable, the chemist will start off with the weighing of the contents of all the receptacles, followed by a homogenising exercise of the gross content pursuant to certain accepted standards, thereafter putting aside 10% out of the total weight, and finally analying that separated 10%. As for the second construction there may be contending sub-interpretations *viz*. the chemist may just weigh the gross content of all the receptacles, put aside 10% and thereafter homogenise only that 10%, followed by the analysis. As testified by the chemist, the amount of sample to be analysed by him would be irrelevant. The other sub-interpretation is for the chemist to weigh the contents of all the receptacle, followed by the homogenizing exercise of all the contents before separating 10%, and finally analysing a portion of the 10% without regard to the amount of sample, similar to the approach of the first sub-construction.

To appreciate the matter better, I will illustrate it by resorting to figures as supplied below, alluding to 100 grammes of pure heroin (not inclusive of the impurities) as the starting off point:

i. 100% analysis entails 100 grammes of heroin;

ii. 10% analysis entails 10 grammes of heroin;

iii. 1% analysis entails 1 gramme of heroin;

iv. 0.1% analysis entails 0.1 gramme of heroin; and

v. 0.01% analysis entails 0.01 gramme of heroin.

Therefore, if a small amount of sample ie, of the suspected substance (comprised of the impurities and the dangerous drugs), as exemplified by the above figures were used, then *vis-a-vis* the whole suspected substance the amount sampled would be unbelievably small. As such, if in relation to the 10% put aside for analysis, only 0.1% had been used, it would mean that in relation to the gross weight of the suspected substance, only a tiny 0.01% would have been analysed. From the above illustration, it could be seen how unsafe it would be for purposes of analysis, to resort to a percentage that is very minimal, as invariably only a tiny amount would be physically analysed. The danger would be further aggravated if the amount of the sample were to be dependant upon the whims and fancies of the chemist. Surely, a statutorily imposed minimum amount would be the answer to this unsatisfactory situation. In the current case the chemist had analysed only 0.1% of the suspected substance out of the gross amount. In relation to the eventual 29.8 grammes as per the confusing charge, we would thus be at the mercy of our imagination to perceive how minute the amount of sample had been utilised in this case.

Regardless of the dilemma, and the possibility of several contending constructions, it is indisputable that if the presumption provision were to be invoked, the sampling percentage would start off with a high 10% of the contents of all the receptacles, as per the first construction. As regards the minimum, if one were to accede to the second construction the sample amount would be irrelevant, as homogeneity would be the key to the whole exercise. In the current case even though only 0.1% had been analysed, as far as the chemist was concerned that was sufficient. If that were to be the guiding principle, he would not even bat an eye if an analysis of 0.01% or less of the sample had been undertaken.

To avoid absurdity out of the above predicament, coupled with the fact that this draconian Act, which is already heavily stacked against an accused person what with it peppered with presumption provisions, any court must therefore be extra vigilant in carrying out its duty. Simply put, if a court were to be in a quandary as to the correct interpretation of any provision, or alternative interpretations exist, or the prosecution had failed to comply strictly with the requirements of any of the statutory provisions, the benefit of the doubt must tilt in favour of the accused person.

As the legislature is assumed to know and understand the rules of grammar, those rules therefore must be considered, as they will assist the court in revealing the correct sense or meaning of the relevant provision under discussion (*Interpretation of Statutes* by Bhindra). I was also guided by the latter's authorship at p. 235 when quoting Lord Greene MR, which reads:

> Absurdity observed Lord Greene, MR in *Grundt v. Great Bolder Gold Mines Ltd*, "I cannot help thinking, like public policy, is a very unruly horse ... that although the absurdity or the non-absurdity of one conclusion as compared with another may be, and very often, is of assistance to the court when choosing between two possible meanings of ambiguous words, it is a doctrine which has to be applied with great care, remembering that judges may be fallible in this question of an absurdity, and in any event it must not be applied so as to result in twisting language into a meaning which it cannot bear. It is a doctrine which must be used to rewrite the language in a way different from that which it was originally framed."

In the course of the submission, the prosecution had ventilated three case laws, which seemed to run counter to the above view, hence the necessity to discuss them. In *Teoh Hoe Chye v. PP; Yeap Teong Tean v. PP* [1987] 1 CLJ 471; [1987] CLJ (Rep) 386 a case backed by *Au Ah Lin v. Public Prosecutor* [1963] MLJ 365, the High Court had concluded that the impugned 10% analysis, was meant to refer to the package and not the contents of each package. The case eventually ended up at the Supreme Court. A number of grounds were raised

in the appeal, but after concluding that an error had occurred with the failure to call a particular witness, highly necessary in the issue of chain of evidence, the discussion abruptly ended there. The appeal was allowed without this relevant point of the 10% analysis seeing the daylight of a discussion. In *Public Prosecutor v. Cheng Meng Bong* [1965] 1 MLJ 237 Yong J similarly had alluded to *Au Ah Lin v. Public Prosecutor* before arriving at his finding. With respect to the learned Deputy Public Prosecutor's argument, the latter two cases are easily distinguishable in relation to the current one, as clarified below. The legal point in *Public Prosecutor v. Cheng Meng Bong (supra)* pertained to s. 116 of the Customs Ordinance 1952, and it reads:

> When any goods suspected of being prohibited or uncustomed or otherwise liable to seizure have been seized, it shall be sufficient to open, examine and if necessary test the contents of ten per centum only of each description of package or receptacle in which such goods are contained and the court shall presume that the goods contained in the unopened packages or receptacles are of the same nature, quantity and quality as those found in the similar packages or receptacles which have been opened.

In *Au Ah Lin v. Public Prosecutor (supra)* the relevant provision under discussion there was s. 61 of the Excise Act 1961, and it reads:

> When any goods suspected of being dutiable or otherwise liable to seizure have been seized, it shall be sufficient to open, examine, and if necessary to test the contents of ten per centum only of each description of package or receptacle in which such goods are contained, if the unopened packages or receptacles are of the same nature, quantity and quality as those found in the similar packages or receptacles which have been opened.

The relevant streamlined portion in the above two provisions emanating from different statutes, though similar in content, would read as follows:

> ... it shall be sufficient to open, examine, and if necessary to test the contents of ten per centum only of each description of package or receptacle ...

Perusing the above phrase, it is quite clear that there is a physical requirement to "open, examine" of each description of package or receptacle, as opposed to s. 37(j) where an analysis of the sample is required. Certainly one can "open or examine" a package or receptacle but not dangerous drugs that are powdery in form, slab like, or even sticky and plant like. Apart from the structure of the phrase, the reading of it, and the logic that must go with the terminologies, it was not surprising that Thompson LP in *Au Ah Lin* had remarked, as regards the then s. 61 of the Excise Act 1961:

> In our view the section does not require the taking of any particular quantity. That is abundantly clear on the reading of the section itself. The words "ten per centum" refer to the packages, not to the contents of each package.

With the existence of several contending constructions lurking in the shadows, to obviate injustice and in the process put into effect the law on drugs effectively as intended by Parliament, a construction most beneficial to the accused person cannot also be sidelined. On that premise by all accounts, to permit the invocation of s. 37(j), the chemist in my view must carry out a sampling analysis of no less than 10% of the contents of all the receptacles. Any other construction would only produce strange and unpalatable results (*Loo Kia Meng v. Public Prosecutor* [2000] 3 CLJ 653; *Leong Bon Huat v. PP* [1993] 3 CLJ 603).

To complete the picture, on the issue of whether the chemist ought to homogenise only the 10% that has been set aside for analysis (after weighing the contents of all the receptacles), or whether the chemist must homogenise first the contents of all the receptacles before separating the required 10%, a more accurate result could be attained if the latter steps were adhered to. In this case, even though the chemist had homogenised the contents of all the receptacles, counter to the above conclusion, he had only analysed a fraction of the contents of all the receptacles and not 10%. This error indisputably was fatal to the prosecution's case.

As the learned Deputy Public Prosecutor had submitted that he wished to allude to direct evidence to establish that the contents of all the receptacles as being dangerous drugs, but with the Chemist Department having followed the recommendations of the United Nations, it was thus encumbent upon me to consider first whether the department had adhered to them to the letter; and importantly whether the United Nations' view has been recognised by our courts. Quite analogous to a situation where the expertise of the chemist must be established first, I view it that these recommendations likewise must similarly be explained, established, clarified and legitimised by the court before accepting them as legally admissible sources. If everything is above board then the acceptance of the chemist evidence will not arise. It must be borne in mind that the Act has yet to statutorily endorse the recommendations or for that matter gazetted by the legislature (see s. 45A of the Act for comparison).

In *The Torenia* [1983] 2 Lloyd's Rep 210 the court at p. 233 had said:

> Second, there is opinion evidence which is given with regard to those facts as they have been proved, and then there is evidence which might be described as factual, which is used to support or contradict the opinion evidence. This is evidence which is commonly given by experts, because in giving their expert evidence they rely upon their expertise and their experience, and they do refer to that experience in their evidence. So an expert may say what he has observed in other cases and what they have taught him for evaluation of the facts of the particular case. So also experts have given evidence about experiments which they have carried out in the past or which they have carried out for the purpose of their evidence in the particular case in question.

Much of the chemist's method and views had not been derived from his experience, experiment or previous education but from a mixed bag of views from the United Nations' document and his department's tests. As an example even the sufficiency of five minutes to homogenise the samples was the result of tests performed by his department, and not his own. The non-inclusion of the five minutes factor in the United Nations manual could also be taken as an indication of its ineffectiveness. Without that United Nations' document being made available to me, it was impossible to conclude decisively on the acceptability of the 0.1% sampling for analysis, as a true reflection of the rest. It is trite that where the evidence of a chemist is based on scientific criteria, one of the ways to challenge them is by adducing evidence that will prove his findings as being scientifically not valid (*PP v. Ang Soon Huat* [1991] 1 MLJ 1). It is indisputable that in the latter circumstance the challenge could only come after the defence has been called. As it were here, I was not even asking for the details of what the chemist did in the laboratory, step by step before coming to his conclusions, but merely his point of reference (*PP v. Lam San* [1991] 3 MLJ 426). As his opinion was sourced from the United Nations' recommendations, and not from his personal scientific experimentation and evaluation, surely the court was entitled to study that source before being satisfied of the unanalysed drugs.

The learned Deputy Public Prosecutor had commendably argued that I was bound to accept the reports of the chemist "on its face value", resorting to *Khoo Hi Chiang v. Public Prosecutor* [1994] 2 CLJ 151 as his authority. Agreeably Abdul Hamid Omar LP had indeed opined a view to the effect. To clear the air, I must at the outset clarify that "on its face value" I was satisfied that the 0.1% sample had indeed contained some heroin and monoacetylmorphines as analysed by the chemist. My dissatisfaction was directed towards the balance 99.9% suspected substance, which had yet to be analysed. At the same time, regardless of the chemist's testimony that this 0.1% was representative of the rest being of the same type of drugs, it needed no expert to confirm that this amount was far below the requirement of the provision of s. 37(j). I on the

other hand could not afford to wear blinkers and have my attention side-tracked primarily by the 0.1%, with the bulk of the unanalysed suspected substance remaining untouched. If the chemist had analysed 100% of the seized suspected substance, or if the prosecution had relied on s. 37(j) after having successfully complied with all its requirements, or by some means had successfully legitimised the invocation of a foreign view in my court, I would not have hesitated to accept the chemist's findings, on their face value (see also *Munusamy v. PP* [1987] 1 MLJ 492; *PP v. Lam San* [1991] 3 MLJ 426).

If the Deputy Public Prosecutor's ingenious attempt to legitimise the prognosis of the chemist based on a minuscule sample, as recommended by the mysterious United Nations' document were to be accepted by me, he thus would have succeeded in invoking a "United Nations' presumption", after rejecting the presumption provision statutorily provided for in s. 37(j) of the Act. The chemist in his testimony, after alluding to that presumption had remarked that the 0.1% sample was sufficiently representative of the gross suspected substance. If it was good enough for the United Nations, it was good enough for him. That being so, the Deputy Public Prosecutor who was blowing hot and cold on this evidential issue would have an alternative weapon to his array of arsenal (and an international one at that). A rose by whatever name referred to is still a rose, and a 'presumption' by whatever name referred to, must remain a presumption and certainly must fail to qualify as direct evidence. Why bother with s. 37(j) when the less fussy "United Nations presumption" could just as easily be useful. Putting it mildly, with the creeping importation of the United Nations' methodology having sidestepped the processes of Parliament successfully, the law of evidence had thus been unwittingly corrupted. This bonus route of circumventing the strict requirements of s. 37(j) by the prosecution surely must deserve microscopic scrutiny by any court, in order to avoid any unfair backdoor importation of unproved foreign concepts.

With all the above questions bothering me, the Deputy Public Prosecutor's submission on this issue must surely fail any thorough scrutiny. With the rejection of the prosecution's stance to prove its case by direct evidence, in reality presumption based, the prosecution thus had failed to prove the relevant particulars, namely the dangerous drugs together with their weights, as per the charge.

Did the prosecution successfully prove actual exclusive custody and control of the receptacles and permitted the triggering of the presumption and knowledge under s. 37(d) of the Act, as clarified by *Muhammed Hassan v. Pendakwa Raya* [1998] 2 CLJ 170?

To answer the above question, it was highly necessary on my part to undertake a thorough sifting exercise of the evidence.

It was crystal clear from the evidence that PW6, as a result of a tip-of had received information of drugs trafficking in the relevant place, as per the charge. Whether the tipster was a paid informer or otherwise was not revealed. The police was also not informed of the identity of the culprit or even the registration number of the vehicle involved. No evidence was adduced in court to indicate whether those impugned dangerous drugs would be contained in some receptacle or receptacles, where and in which part of the vehicle they would be hidden, and whether any other third party would have access to them. These questions were relevant as, in another tip-of case Edgar Joseph Jr. J in *Abdullah Zawawi bin Yusof v. PP* [1993] 4 CLJ 1 had occasion to opine:

> With respect, given the fact that this was a case where the police were acting on a tip-of, undoubtedly by an informer, who might have been a paid informer, the onus was not on the defence to prove possibility of access by others but on the prosecution to exclude such possibility.

The facts elicited here highlighted that the accused person was briefly seen riding a motorcycle, and then rammed by the police car resulting in him being pinned by his machine. When he attempted to remove his leg a package rolled off from the basket of the vehicle. Regretfully, there was no evidence adduced by the prosecution to confirm that:

a. when the police saw him the first time around the package was in the basket; and

b. the police had seen the accused person putting any package in the basket.

Apart from the above shortcomings I was also confronted by these questions and facts, namely that:

1. the accused person did not own the motorcycle. The evidence showed that one Mr. Kwa Hock Hwa was the registered owner who unfortunately did not come forward to testify. Even though the police did attempt to locate him, the manner of tracing him was not done satisfactorily;

2. there was no evidence tendered to indicate how the accused person came by the vehicle;

3. there was no evidence tendered to indicate the length of time he had physical custody of the vehicle;

4. there was no evidence of whether he had borrowed or stolen the motorcycle;

5. there was no evidence whether the registered owner or anyone else had put the package in the basket of the vehicle. Was it misfortune that had caused his arrest;

6. there was no evidence of the accused person having been observed prior to the ramming incident by the police; and

7. there was no evidence of the probability of the plastic package being covered by a blue jacket.

The accused person even at the early stages of the case, consistently canvassed that there was a blue jacket retrieved by the police despite their vehement denials (*PP v. Mohd Noor Jantan* [1979] 2 MLJ 289. Connected to this relevant defence were the following disturbing shortcomings on the part of the prosecution's case, namely:

i. the dearth of a police report (I was mindful that this was a tip-of case and any reports made thereafter (subject to further arguments) may not qualify as first information report). Even though a police report was made it was not offered to the defence at the end of the prosecution case;

ii. no search list was issued despite the requirements of the Criminal Procedure Code (see *Alcontara a/l Ambros Anthony v. PP* [1996] 1 CLJ 705); and

iii. the existence of defects in the handing over list. The investigation officer had admitted that this document was incomplete and had certainly left out certain items collected in the course of the investigation.

The combined effect of the above flaws conspicuously cast a dark shadow over the prosecution's denial that a blue jacket was retrieved from the scene. This bluejacket, which may not have been recorded in the handing over list, and had it been in the basket, could have covered the package thus denying the accused person sight of it

Edgar Joseph Jr. SCJ in *PP v. Lin Lian Chen* [1992] 1 CLJ 2086; [1992] 1 CLJ (Rep) 285) had occasion to state:

> Turning to the evidence, although it is true that the respondent was the sole occupant of the Honda, being the driver and therefore in charge of it, the fact remains, that he was not the owner and, there was no evidence from which it could be reasonably inferred that he must have been in custody or control of the seven newspaper packages or the cigarette packet which contained the offending exhibits.
>
> In this context, mere knowledge of the presence of the seven newspaper packages or the cigarette packet without more would not be sufficient to constitute custody or control thereof though it would constitute an essential step in that direction. But, the position here was that there was not even proof of such knowledge much less proof of knowledge of the presence of the offending exhibits in the seven newspaper packages or the cigarette packet. For example, there was nothing to indicate for how long in all the respondent had been in charge of the Honda and such evidence as has been adduced indicated that he was seen only briefly at the wheel. No evidence was adduced as to whether the seven packages or the cigarette box had been dusted for fingerprints ...

Perusing the above case, it was clear that the accused person was aware of the newspaper packages but not the contents. In the current case, there was no conclusive evidence available for my consideration to show that he knew of the existence of the package, let alone the contents. Therefore, quite similar to the above case, the evidence against the accused person here was essentially of juxtaposition, amounting to nothing more than grave suspicion. That form of evidence certainly would be totally inadequate to prove control or even custody of the receptacles sufficient to attract the presumption under s. 37(d).

Has Trafficking Been Proved?

To succeed in its case, the prosecution must, *inter alia*, prove that the accused person was trafficking those drugs at the material time and place as per the charge. Under s. 2 of the Act, trafficking reads:

> Trafficking includes the doing of any of the following acts, that is to say, manufacturing, importing, exporting, keeping, concealing, buying, selling, giving, receiving, storing, administering, transporting, carrying, sending, delivering, procuring, supplying, or distributing any dangerous drugs.

A brief perusal of the definition, which covers a wide spectrum of proactive acts will highlight the difficulty of establishing any one of them, as the requirement of *'mens rea'* is quite obvious in all of them. For reasons known to Parliament, provisions have been legislated whereby if the prosecution succeeds in proving possession of dangerous drug, and with it being above a certain amount, an accused person shall thus be presumed to be trafficking under s. 37(da) of the Act. To constitute possession, and to restate the obvious,

there must first be an express affirmative finding on the issue of custody or control over anything whatsoever containing any dangerous drug. With that established, then only will the rest of the deeming provision of s. 37(d) be applicable. If the prosecution fails to overcome this hurdle of proving possession, the rest then becomes a futile exercise. As it were here, it was my finding of fact that the prosecution had failed to prove conclusively the ingredient of possession, thus preventing the latter from embarking into another legal phase.

Not surprisingly, at the outset of the submission the learned Deputy Public Prosecutor had ventilated that he intended to invoke the specific presumption of s. 37(da) (iiia) to satisfy the said act of trafficking. The law is quite settled now in that the prosecution would commit an error if it were to apply one presumption upon another (double presumption), en route to establishing its case (*Loo Kia Meng v. Public Prosecutor (supra)*; *Muhammed bin Hassan v. PP* [1998] 2 CLJ 170). Even though in the latter case both presumptions came from the same statute, I see no legal impediment why that settled law might not be applicable to the current facts, where one of the presumptions emanated from an external source.

On the assumption that I had even permitted the invocation of the United Nations' presumption, and in the process the prosecution did succeed in proving the dangerous drugs (and for that matter possession also), a second invocation of a presumption provision under s. 37(da) (iiia) would certainly not be permissible. Without the assistance of the latter provision, and thus failing to prove the ingredient of trafficking, the death knell of the Deputy Public Prosecutor's case surely was never louder.

To restate the prosecution's case, suffice if I summarise its failures on account of:

1. the presentation of a defective charge;
2. the failure to prove conclusively the dangerous drugs and their weights;
3. the failure to prove possession of the dangerous drugs as per the charge; and
4. the outright failure to prove trafficking.

Based on the above grounds, I had no hesitation in having the accused person acquitted and discharged without the necessity of calling the defence, as the prosecution had failed to prove a *prima facie* case against him.